Supreme Court, U.S.
FILED
SEP 30 1992
CLERK

No. 92-345

In The

Supreme Court of the United States

October Term, 1992

CAROLCO TELEVISION, INC.,

Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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DESIGNATION OF CORPORATE RELATIONSHIPS

National Broadcasting Company, Inc. ("NBC") filing this brief in opposition to Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals as a Respondent in this proceeding, states that:

This is its original Designation of Corporate Relationships.

NBC is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which is a wholly-owned subsidiary of General Electric Company. All subsidiaries of NBC are wholly owned by NBC and/or General Electric Company or their wholly-owned subsidiaries.

Dated: Sept. 18, 1992.

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INTRODUCTORY STATEMENT

Petitioner Carolco Television, Inc. ("CTI") maintains that, in permitting Respondent National Broadcasting Company, Inc. ("NBC") to set-off a debt owed by it to Debtor De Laurentiis Entertainment Group ("DEG") against a debt owed by DEG to NBC after confirmation of DEG's plan of reorganization (the "Plan"), the Bankruptcy Court, the District Court and the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") failed to observe res judicata principles.[1] In particular, CTI asserts that the ruling in this case allowed NBC to collaterally attack the order (the "Confirmation Order") confirming the Plan, which Plan and Confirmation Order CTI contends expressly eliminated NBC's set-off rights.

In accordance with Rule 15.1 of the Rules of the Supreme Court of the United States,[2] NBC must point out

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[1] It is interesting to note that CTI did not even raise the res judicata issue in its appeal from the Bankruptcy Court to the District Court. The issue was raised for the very first time in CTI's appeal to the Ninth Circuit.

[2] Rule 15.1 states:

> A brief in opposition to a petition for a writ of certiorari serves an important purpose in assisting the Court in the exercise of its discretionary jurisdiction. In addition to other arguments for denying the petition, the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the court if certiorari were granted. Unless this is done, the Court may grant the petition in the mistaken belief that the issues presented can be decided, only to learn upon

to this Court that the uncontroverted facts underlying CTI's petition (the "Petition") do not raise the issue that CTI seeks to appeal. The Petition rests on the assumption that the Plan *expressly* eliminated NBC's set-off rights. It did not. On the contrary, the Plan and the Confirmation Order were totally silent on this matter. Accordingly, the only issue raised by the facts of this controversy is whether the Confirmation Order and the Plan *impliedly* eliminated NBC's set-off rights. That issue, in turn, requires reconciling the apparent conflict between Bankruptcy Code §§ 553 and 1141. As CTI concedes, the Ninth Circuit discussed at length the interplay between §§ 553 and 1141 of the Bankruptcy Code in this case, and held that § 553 overrides § 1141 so that confirmation of the Plan did not impliedly eliminate NBC's set-off rights. CTI does not seek to appeal this holding.

Instead, CTI has chosen to appeal only the issue of res judicata – which is not even raised by the facts of this case. Because the Plan did not affect NBC's set-off rights either expressly or impliedly (by operation of § 1141), the issue of the res judicata effect of the Plan has no bearing on those rights. Accordingly, the Petition must be denied.

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full consideration of the briefs and record at the time of oral argument that such is not the case. Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later. Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition.

OBJECTION TO PETITIONER'S STATEMENT OF FACTS

While, in general, NBC does not object to CTI's statement of facts, it does object to any inference which might be drawn from that statement to the effect that NBC was in any way dilatory in asserting its right of set-off. Both the District Court and the Ninth Circuit expressly found that NBC had been diligent in pursuing its set-off claims for at least a year before entry of the Confirmation Order, and CTI has never presented any evidence to the contrary.

THE FACTS OF THIS CASE DO NOT PRESENT THE ISSUE RAISED BY CTI IN ITS PETITION

CTI's argument that the Ninth Circuit's decision violates res judicata principles is premised upon its assertion that the Plan and the Confirmation Order expressly eliminated NBC's set-off rights. To support this argument, CTI relies upon two provisions of the Plan. The first provision is Schedule 5.7(a) of the Acquisition Agreement[3], which lists the liabilities assumed by CTI pursuant to the Plan and which does not list any liability to NBC. However, it is well established that a right of set-off may be asserted against an assignee of an account receivable, even though the assignee does not assume the obligations sought to be set-off. *See, e.g.*, California Code of Civil Procedure

[3] All capitalized terms not otherwise defined herein shall have the same meaning as set forth in the Petition.

§ 431.70; *Koffman v. Martin-Imperial Co.*, 48 Cal.Rptr. 492, 239 Cal.App.2d 38 (1966); *Royal Indemnity Co. v. Security Truck Lines*, 27 Cal.Rptr. 858, 212 Cal.App.2d 159 (1963).

Second, CTI seeks to rely on Section 8.3.4 of the Plan, which vested the purchased assets (including the account receivable due from NBC) in CTI free and clear of all liens, claims or encumbrances not otherwise provided for in the Plan or the Confirmation Order. Again, however, it is well established that the vesting of assets in an entity free and clear of liens, claims or encumbrances does not in any way eliminate rights of set-off. *See, e.g., Marley v. United States*, 381 F.2d 738 (Ct.Cl. 1967); *Preuss v. United States*, 412 F.2d 1293, 1304 (Ct.Cl. 1969).

Indeed, this is the very issue that the Ninth Circuit resolved in holding that Bankruptcy Code § 553 overrides Bankruptcy Code § 1141, a determination from which CTI does not appeal. Specifically, Bankruptcy Code § 1141(c) provides that, with exceptions not here relevant, " . . . the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor." Notwithstanding the language of § 1141, the Ninth Circuit found that § 553[4] preserved rights of set-off, post-confirmation even

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[4] Bankruptcy Code § 553(a) states as follows:

> (a) Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case except [for exceptions not here relevant].

where, as here, the Plan vested the assets in the reorganized entity free and clear of liens, claims and encumbrances.

All of the cases relied upon by CTI in the Petition for the proposition that the ruling in this case violates res judicata principles are distinguishable, as all of these cases address instances in which creditors have attempted, collaterally, to attack the express provisions of confirmed and unappealed plans of reorganization. In *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938), and *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987), the confirmed plan of reorganization at issue expressly provided for the discharge of a third-party guarantor's liability. Again, in *Department of the Air Force v. Carolina Parachute Corp.*, 907 F.2d 1469 (4th Cir. 1990), "[t]he debtor's reorganization plan expressly provided for assumption of the government's contracts," – Petition, p. 9 – a result the government subsequently sought to attack in a collateral proceeding.

In the instant case, neither the Plan nor the Confirmation Order in any way expressly purported to affect the set-off rights of NBC. The issue of whether the Plan impliedly affected those set-off rights was determined by all of the courts below in favor of NBC, and CTI does not attempt to appeal that determination. Because the Plan does not eliminate NBC's set-off rights, either expressly or by operation of Bankruptcy Code § 1141(c), confirmation of the Plan can have no res judicata effect on those rights. Accordingly, the issue of res judicata, the only one upon which CTI's Petition rests, is not raised by the undisputed facts of this case.

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Dated: Sept. 18, 1992.

Respectfully submitted,

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